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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	File No. WT 99-263
	)	DA 99-1458
Petition of the Wireless Consumers Alliance,	)	
Inc. for a Declaratory Ruling	)	

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TO: The Federal Communications Commission

ERIKA LANDIN'S REPLY TO JOINT COMMENTS OF AT&T CORP. BELLSOUTH CELLULAR CORP. AND AB CELLULAR HOLDING, LLC TO PETITION FOR DECLARATORY RULING

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I. INTRODUCTION

Erika Landin, plaintiff in an action entitled Erika Landin v. Los Angeles Cellular Telephone Company, Case No. BC 143305, pending in the Superior Court of the State of California, County of Los Angeles, before Judge Ernest M. Hiroshige, hereby submits her reply to the Joint Comments of AT&T Corp., BellSouth Cellular Corp. and AB Cellular Holding, LLC ("AT&T") in response to the Petition for Declaratory Ruling ("Petition") filed by the Wireless Consumers Alliance, Inc. ("WCA") in the captioned proceeding.[1]

AT&T begins with the proposition that the only question properly before the FCC is whether a court can order restitution where consumer protection statutes have been violated, asserting that such restitution constitutes "judicial rate setting." If this were true, then cellular companies would be completely exempt from suit for violation of any state's consumer protection laws. This cannot be the intent of Congress when it reserved to the states the right to regulate the "terms and conditions" of wireless service under Section 414 of the Communications Act.

While a court judgment which purports to set rates to be charged prospectively, or which erroneously applies existing rate levels might interfere with a rate regulation regime, equitable remedies do not involve such interference or conflict. Only a sophistic definition of rate regulation designed to guarantee the retention of all revenues collected by a cellular firm - even if illegally obtained -would create the kind of categorical conflict AT&T suggests is present. But even the most rigorous of fair rate of return rate

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[1] Ms. Landin filed her Comment to the Petition on September 10, 1999 because she has filed consumer fraud claims against L.A. Cellular for failing to disclose or advertise the

regulation systems foresee legal consequences, including penalties, fines, and court judgments, arising from illegal business conduct under state law.

AT&T 's argument that an award of restitution in a consumer fraud case always constitutes judicial rate setting would obligate the FCC to operate as daily operating manager of every cellular firm. It would have to decide every contract dispute or consumer fraud claim (which often involve restitution), handle every labor problem (where restitution also may be ordered), inspect every facility for safety, environmental compliance, zoning status, tax payment record, etc. The FCC would have to review every advertisement and pass upon them in advance, or serve as adjudicator post hoc and assess restitution for false advertising where warranted.

AT&T disingenuously forgets that cellular firms operate in a complex world requiring legal compliance across a range of subject areas. FCC regulation was not intended to completely preempt every state court action. If it were, not only would Congress have so specified, but the FCC would be forced to act as plaintiff in every suit against a cellular phone company.

Restitution is not "rate setting." It is a court exercising its equitable power in a dispute to put the parties where they were before the offense occurred. It is part of operating within a system of law, and a generic and given part of business. Civil penalties and criminal fines traditionally are imposed on regulated industries where they violate laws. These assessments are business expenses which must be paid for by ratepayers or borne by stockholders from profits.

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availability of a dropped call credit. Ms. Landin, therefore, believes that resolution of the WCA's petition may impact the restitutionary relief she is requesting.

The rationale behind regulation of cellular firms (or any regulatory system) is not a desire to confer special immunities and privileges upon those regulated. It is quite the opposite, to superimpose an additional element of regulation where the market (including existing state controls) is inadequate to prevent corporate abuse. It is ironic for such a firm, subject to the traditional "clothed in the public interest" status which attends all regulated business, to reverse the public intent that there be additional oversight - into an instruction for the elimination of oversight and remedies extant.

II. ARGUMENT

A. Restitution Is Not Rate Regulation

AT&T claims that an allegation of overcharge somehow involves the alteration of rates. But complaints which deal with deceptive advertising or billing of the wrong amount, or failing to disclose necessary information so consumers know what they are or are not receiving - accepting as given the rates established by regulators or by the market (if that is the regulatory option), do not. Hence, if regulators have not used rate setting powers but instead have deferred to market levels as competitively set, restitution is properly based on that measure. In either case, the court does not alter the standard rate.

Assume that LA Cellular was sending its bills to the wrong people. Would that be a rate regulation issue preempted by the FCC and requiring the latter to handle it? Or assume LA Cellular was embezzling funds from a business by deliberately overcharging in violation of criminal statutes. Is the District Attorney to take the case to the FCC? Is a court actually barred from ordering repayment of the overcharge to the victim because that would involve "making a calculation of the proper overcharge which would involve market level determination which would interfere with FCC jurisdiction"?

AT&T purports to accept the fact of limited FCC jurisdiction, and writes that "the only thing that a state court may not do is award monetary relief...when such an award amounts to rate regulation." (AT&T Comment at 4.) That definition begs the question. AT&T would define rate regulation as any taking of monies from LA Cellular. Contrary to the misleading assertion of AT&T, there is nothing in the Spielholz or Landin suits against LA Cellular which in any way requires the evaluation of "the reasonableness of FCC rates." To repeat, the rates are accepted as a given.

There are numerous specific problems with the arguments of AT&T, including:

At page 4 of its comment, AT&T writes: "the FCC is not powerless to enjoin, or award monetary relief for practices by carriers that are deemed to be fraudulent or misleading..."

Possible FCC jurisdiction over a licensee in an area outside of rate setting does not imply exclusivity. There are strong public policy reasons for coextensive jurisdiction to remedy wrongdoing. As noted above, cellular telephone companies are regulated because they are in need of more regulation - an additive layer, not the removal of existing public protections. Granted, where existing protections specifically conflict with a federal policy entitled to supremacy, the latter supersedes. The problem here is how does repaying consumers who have been misled and making LA Cellular disgorge unjust enrichment based on basic statutory provisions applicable to all businesses conflict with rate setting?

At page 6, AT&T writes that the Spielholz case interferes with rate setting because to make those victimized by violations "whole," the court would have had to set a reasonable rate corresponding to the value of wireless services received by the plaintiffs, and refund the difference...."

But the reasonable rate is based on the filed tariff or rates set by a competitive market. Because rates are relevant to market value and related to an amount necessary to make a victim whole, AT&T jumps to the non-sequitur conclusion that such an assessment is rate setting. How is restitution based on the filed rate an interference with rate regulation powers?

At page 7, AT&T writes that there have been 45 suits filed against it across the country attacking "how wireless calls are charged."

Such an admission may well warrant regulatory attention; in fact, the categorical removal of such suits against LA Cellular reveals one of the policy reasons for coextensive jurisdiction, its utility in giving the regulator information about problem areas - including the development of court findings for regulatory use as appropriate. The alternative urged by AT&T is to define exclusive jurisdiction to include not just rate setting, but "how rates are charged" which is utility-talk for misleading advertising, fraudulent billing, and other consumer protection or business tort offenses.

At page 13, AT&T argues that restitution interferes with rate setting, claiming that damage awards can have a regulatory effect and are "indeed a potent method of governing conduct..."

Spielholz and Landin do not concern damages, or the at-law jurisdiction of a court, but the equitable jurisdiction of a court to set matters right, to end the violation. One hopes that restitution also may influence private actors to obey the law. But this argument does not support the conclusion that the FCC has exclusive jurisdiction over any subject area where a restitutionary order may be entered. Has AT&T thought through what the removal of such restitutionary power implies in terms of due process? If the court is to be categorically prohibited from entering restitutionary orders to put the parties back where they were, can it hear the case at all? Isn't the subject matter - whatever it might be - then also subject to exclusive FCC subject matter jurisdiction? The AT&T argument implies the removal of the basic equitable power of the court over these particular businesses, regardless of subject matter.

At page 13, AT&T also argues that restitution threatens the "uniformity" of rate regulation. Apart from the fact that uniform rates have not been imposed, doesn't any subtraction of revenue from a cellular carrier create that problem? But if that revenue is obtained illegally, shouldn't it return it? Doesn't uniformity assume "operating lawfully?" Should those who operate unlawfully be assured "uniform revenue" with those who operate lawfully?

At pages 17-18, AT&T argues that charging for calls that do not occur (and which are in violation of representations to consumers) is a rate regulation issue subject to preemption. And it repeats that the remedy would impermissibly require the court to calculate an amount which would be "rate making." How so? Does not such an objection apply to any restitutionary award for any violation?

At pages 19-20, AT&T argues that there are other remedies for consumer protection violations. Are cases to proceed with authority only for injunctions applicable to future conduct, and all plaintiffs should apply to the FCC for a restitutionary order? The FCC is going to then, what, retry the case? Review the transcript?

At pages 20-23, AT&T cites "filed rate" doctrine cases. How are the LA Cellular cases in conflict with any filed rate? How does a restitutionary order, based on giving back what a violator gained improperly from an unlawful taking constitute the contradiction of a filed rate?

Thus, AT&T claims that telling a consumer that his phone will connect and be heard in his home town of Eureka, when after purchase all the caller hears is a series of clicks and where AT&T knows that it has no facilities capable of transmitting or receiving in place there, is not consumer fraud, but a rate dispute. Or, in the alternative, the determination of the ill-gotten amount to be returned involves some calculation of value, which implies rate setting. The first is not a rate dispute, but lying and collecting ill-gotten gains in the process. The second requires the violator to give back what he improperly took. The court does not set the rate. Either the FCC has already set the correct applicable rate, or it has been set by the violator in the charge he has imposed. Nobody is second guessing any regulator.

Perhaps the most disappointing facet of the AT&T position is the reality that there is no regulator setting rates in this field. Much of the above discussion presupposes the much stronger case for AT&T that the FCC has indeed been given and exercises full rate regulation power. In fact, in most respects rates are set by market forces (such as they are). AT&T is correct that state and local regulators may not set rates - if they are to be set, presumably it will occur at the federal level. But that assignment of territory has nothing to do with state and local regulation of business practices apart from the amount to be charged. If the amount to be charged is based on the market, and that is the regulatory decision, than the courts will properly use that measure in assessing proper restitution. If it is based on an specific number created by a regulator with exclusive authority to so set, than it will be based on that number.

B. Legal Precedent Does Not Prohibit Restitutionary Relief

AT&T claims that Day v. AT&T, 63 Cal. App. 4 325 (Cal. App. 1998) prohibits restitutionary relief in false advertising or consumer fraud cases. This is clearly not the holding of Day. Day, in fact, supports Spielholz's and Landin's positions here, because it held that although common carriers need not disclose their rates other than in their tariffs, if they advertise their rates, they must do so fairly.

In Day, plaintiff argued that defendant had failed to disclose in advertising and packaging materials that calls would be charged by rounding up to the next full minute, as was set forth in the applicable tariff. Plaintiff there alleged that the advertising was unfair and misleading under Sections 17200 and 17500 of the Business and Professions Code.

In the situations before the FCC, plaintiffs are not challenging tariffed provisions. Instead, plaintiffs complain that L.A. Cellular, in its communications with customers, failed to disclose material information. Thus, plaintiffs are asking that L.A. Cellular disclose services correctly in advertising and packaging materials other than the tariff.

The court in Day said that this type of claim is not barred by the filed rate doctrine:

> What if a matter such as the one before us, which makes no claim of fraud in the charged rate, nor a claim of breach of contract for services, nor an attack on the reasonableness of the rounding up practice, but instead complains of improper advertising practices in the promotion of the services and seeks to enjoin the further use of those practices? As stated by the court in Marcus [938 F.Supp. 1159, aff'd 2d Cir. Feb. 24, 1998 (F.3d)]:
> Plaintiffs' request for an injunction requiring AT&T to disclose its billing practices and materials other than the tariff is not barred by the filed rate

doctrine, because that type of relief would have no impact on the tariff charged. It would not require AT&T to charge more or less than the filed rate, nor would it permit a customer to pay more or less than the filed rate.

Day at 335.

The Day opinion specifically allows for false advertising claims:

> The State of California has no requirement that common carriers disclose their rates anywhere other than in the rate schedules filed with the PUC. Nonetheless, businesses are prohibited from engaging in advertising practices which are potentially misleading to the public, so that if they choose to promote their rates, they must do so with sufficient accuracy that they do not risk misleading or deceiving the consumer. We hold that under California's Unfair Business Practices and Deceptive Advertising provisions, respondents are prohibited from disseminating misleading or deceptive packaging materials with their prepaid phone cards. Appellants are entitled to seek to enjoin the alleged practice, and respondents' demurs to this claim were erroneously sustained.

Id.[2]

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[2] In Day, an injunction was sought to prevent the defendants from continuing their allegedly deceptive practices. The court held that monetary recovery for the entire cost of the prepaid phone cards was prohibited as a matter of law because "once the cards were purchased and used, the members of the public received exactly what they paid for." 63 Cal. App. 4th at 338. (See also Stevens v. Superior Court, 1999 WL 788808 (Ct. App., 2d Dist., Div. 3, Ca. 1999) ("To the extent that the fees [plaintiff] seeks represent payment for the policies themselves, they are not recoverable because [plaintiff] received a policy for his payments (citing Day)... However, [plaintiff] may seek restitution of commissions received by unlicensed agents and brokers"). The Day court noted, however, that the unfair competition provisions under California law allowed for equitable orders "as may be necessary to restore any person in interest any money or property, real or personal, which may have been acquired" by means of unfair competition or unlawful advertising practices. (Sections 17203, 17535). Thus, the court in Day specifically recognized that a court may award restitution under California law directly related to the improperly obtained proceeds or overcharge the defendant has obtained to which it was not entitled. In Ms. Landin's case, L.A. Cellular should not be allowed to retain the dropped call credit it withheld as a result of failing to disclose its dropped call credit policy. Similarly, in Spielholz's case, L.A. Cellular should not be allowed to retain those funds obtained for service never provided in various geographical areas.

Contrary to the factual situation in Day, plaintiffs in Spielholz and Landin are only seeking to obtain credits for those charges which were wrongfully taken by means of L.A. Cellular's unfair business practices. Because L.A. Cellular was not entitled to fees for services it never provided, plaintiffs are not contesting the rates charged or payments for actual services.

AT&T also claims that restitution awarded in consumer fraud cases somehow constitute "damage actions . . . disguised [as] retroactive rate adjustments". (AT&T's Comment at 10, fn. 21.) The cases cited by AT&T in support, however, are clearly inapposite. San Diego Building Trades Counsel v. Garmon, 359 U.S. 236 (1959) was not a state consumer fraud action but an action by an employer against a union for an injunction to restrain picketing and for damages, which the United States Supreme Court held was arguably preempted under the National Labor Relations Act. In Arkansas Louisiana Gas Company v. Hall, 453 U.S. 571 (1981), natural gas producers brought a state court action against a buyer claiming that the buyer had breached a contract by failing to increase its payments as required by the lease clause. There, plaintiff was directly attacking the filed natural gas rate in attempting to get a higher contract rate. There were no claims for false advertising or consumer fraud or that defendant had obtained funds for services not performed. The other cases cited by AT&T similarly did not involve restitutionary relief awarded by a state court for false advertising or other consumer fraud violations.

Other cases cited by AT&T in its Comment (at11-18) are also distinguishable. The Supreme Court in AT&T Co. v. Central Office Telephone, Inc., 524 U.S. 214 (1998), while discussing the basic contours of the filed rate doctrine, concluded that plaintiff's claims were barred because it "asked for privileges not included in the tariff." Id. at 1964. But, in the Spielholz and Landin cases, the claims do not seek to alter any filed tariff, but instead relate to defendant's advertising. See Central Office, 118 Sup. Ct. at 1966 (Renquist, C.J. concurring) (noting that the filed rate doctrine bars "only those suits that seek to alter the terms and conditions provided in the tariff".)

AT&T also argues that plaintiffs' false advertising claims are preempted. In order to find that a federal law conflicts with state law, the conflict must arise when "compliance with both federal and state regulations is a physical impossibility", Florida Lime & Avacodo Growers, Inc. v. Paul, 373 U.S. 132 (1963) or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). Neither condition exists in the Spielholz or Landin case. Nothing in the complaints attempts to regulate L.A. Cellular's rates. Indeed, state consumer fraud claims are intentionally preserved by the Federal Communications Act, which leaves to the states the right to prevent the very practices plaintiffs allege here - false advertising. The fact that plaintiffs claim restitution does not conflict with rate regulation. Plaintiffs are not asking to adjudicate the reasonableness of L.A. Cellular's charges for phone calls; plaintiffs are alleging that defendant advertised its services in a deceptive and unfair manner.

Simons v. GTE Mobile Net, Inc., No. H-95 5169 (S.D. Tex. April 11, 1996) did not deal with consumer fraud issues, but a contract claim actually challenging the reasonableness of early termination fees. Although the court held that the contract claim was preempted by the Communications Act because Section 201(b) exclusively governs the rates and practices of cellular carriers, the order was unsupported by any legal authority.

Moreover, Esquivel v. Southwestern Bell Mobile Systems, 920 F.Supp. 713 (S.D. Tex. 1996) issued in the same district on a later date, held just the opposite. In Esquivel, plaintiff brought a consumer fraud action relating to defendant's practice of accessing liquidated damages that the customer terminated service before the expiration of the agreed term. The court found that the issue related to liquidated damages was a customer billing or other consumer protection dispute not preempted by the Communications Act, and remanded to state court. Although the court in dictum says that if a claim questioned a regulatory rate charged by a commercial mobile service, this would be a preemptive factor that could be asserted as a defense in state court (920 F.Supp. at 714), the consumer protection matter at issue related to the "terms and conditions" of defendant's services, not its rates. Similarly, the claims in these cases do not question L.A. Cellular's rates for service; they are for consumer fraud in connection with defendant's deception regarding its services and billing practices.

Wegoland, Ltd. v. Nynex Corp., 806 F.Supp. 1112 (S.D. N.Y. 1992) aff'd, 27 F.3d 17 (2d Cir. 1994) is also inapplicable. There, plaintiff sued Nynex and other telephone companies and subsidiaries for fraud. The basis of the claims was that defendants gave regulatory agencies and consumers misleading financial information to justify their inflated rates. The court held that because the complaint asked it to determine the reasonableness of rates that were intended to be regulated by ratemaking agencies, the action was preempted. In the case at bar, the filed rate doctrine is not implicated. The claims relate to whether L.A. Cellular's failure to disclose material facts about its service and billing and a court does not need to determine whether L.A. Cellular's commercial rates were reasonable in order to adjudicate the claims.

In Marcus v. AT&T Corp., 138 F.3d 46 (2d Cir. 1997), plaintiffs alleged that AT&T had fraudulently concealed its practice of billing for service rounded up to the next full minute. There, however, defendant was not a cellular telephone company but a long distance carrier which had actually filed a tariff with the FCC. Spielholz and Landin do not question the reasonableness of any filed tariff.[3] Moreover, in both Spielholz and Landin, the claims are not even tangentially related to the rate charged for service, as in Marcus, but a failure to disclose service available and/or a billing practice. Finally, other courts have disagreed with the reasoning and applicability of Marcus. See, e.g., Tenore v. AT&T Wireless Services, 962 P. 2d 104, 117, fn.123 (Wash. 1998) (rejecting applicability of filed rate doctrine and holding that false advertising claim did not require technical and expert evaluation by the FCC).

In In re Comcast Cellular Telecommunications Litigation, 949 F.Supp. 1193 (Ed. Pa. 1996), cited by AT&T, the court denied a motion to remand to state court because two of the counts of the complaint directly challenged the reasonableness of rates charged by Comcast for cellular phone services. The court found, however, that the first two counts of the complaint, which were aimed solely at Comcast's failure to adequately disclose its practice of billing for non-communication time and rounding up the length of phone calls did not challenge the reasonableness or legality of Comcast's billing practices.

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[3] In Landin, moreover, her claim that she is entitled to a dropped call credit was specifically provided for in the tariff.

AT&T also fails to distinguish cases where courts have held that claims for false advertising do not seek to determine the reasonableness of a cellular phone company's billing rates. For example, Weinberg v. Sprint Corp., 165 F.R.D. 431 (D.N.J. 1996) directly supports Landin's and Spielholz's positions here. Sprint promoted its rate of ten cents per minute for telephone calls. Plaintiff alleged deceptive and misleading advertising in promotional practices involving Sprint's practice of "rounding up" (in other words, charging more than ten cents per minute for any call which does not last precisely one minute). Even though the claim related to rates, the court held that it was not preempted by the Federal Communications Act because it involved "disclosure of those rates and damages for the alleged failure to disclose their calculation." And "resolution of this suit does not depend upon the 'reasonableness of Sprint's billing rates'. . . but upon the reasonableness of Sprint's business practices in conducting its advertising campaign." 165 F.R.D. at 435.

The court went on to say:

> Further, no issue of federal law must be decided in order to adjudicate [plaintiff's] suit. That the trial court may find it necessary to refer to Sprint's published billing rates, only the Communications Act does not transform the complaint into one presenting a federal question as essential to recovery. Id.

In discussing its holding that claims were not preempted, the court also rejected L.A. Cellular's argument that Section 207 of the Communications Act provides a federal private right of action:

> The suit does not challenge Sprint's provision of services or its tariff rates, nor does it dispute the calculation of those rates. Instead, plaintiff's state law claims relate to Sprint's advertising practices. Sections 201, 202, and 203 of the Communications Act impose no duty on common carriers to make accurate and authentic representations in their promotional practices,

> and, therefore, Section 207 provides no remedy for a deviation from such conduct. (Citing Boyle v. MTV Networks, Inc., 766 F.Supp. 809, 816 (N.D. Cal. 1991). Accordingly, the Court finds that the Act's civil enforcement provision does not provide a remedy through which a customer may recover for a common carrier's failure to disclose a business practice. 165 F.R.D. at 437.

Because the action related to statements made by Sprint in advertising promotions, the court noted that "the conduct at issue is neither regulated by the Communications Act not dependent upon Sprint's status as a regulated long distance carrier. 165 F.R.D. at 439.

The court therefore held that:

> . . . it lacks the authority to recharacterize plaintiff's claims as exclusively federal because the Communications Act does not contain a civil enforcement provision 'within the scope of which the plaintiff's state claim[s] fall. (Citation omitted). 165 F.R.D. at 439.

III. CONCLUSION

For the reasons set forth above, the Commission should issue the rulings requested by the WCA and declare that state courts may award restitution against a cellular phone company for false advertising or other violations of the state consumer fraud acts.

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Respectfully submitted,

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